Tribal Technical Advisory Group

To the Centers for Medicare & Medicaid Services

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October 21, 2010

Jay Angoff, Director
Office of Consumer Information and Insurance Oversight
U.S. Department of Health & Human Services
200 Independence Ave, S.W.
Washington, D.C. 20201

Dear Mr. Angoff,

I write as the Chair of the Tribal Technical Advisory Group (TTAG), a panel of tribal officials that provides policy advice to the Centers for Medicare & Medicaid Services on participation of American Indians and Alaska Natives and health programs of the Indian Health Service, Indian tribes, tribal organizations and urban Indian organizations in CMS-administered health programs. Because Indian people and the Indian health system have a unique status under Federal law, many TTAG members were among the tribal advocates who urged Congress and the White House to include Indian-specific provisions in health care reform legislation.

The TTAG and its technical staff have prepared a position paper on The Definition of "Indian" under the Affordable Care Act to help guide implementation of provisions that impact Indian people and the Federal health system created to serve them. Since OCIIO oversees the Department's ACA implementation activity, we wanted to share this paper with you and your colleagues. As you perform your implementation efforts, we ask you to keep in mind that it is often necessary to include in regulations express mention of Indian people and the Indian health system in order to assure full rights of participation and access.

The Act presents great opportunities and challenges for Indian Country. Only by working closely together can we assure that this law will bring improvements in access to health care for American Indians and Alaska Natives. Because of the complexity of the law and the broad role Tribes play as governments, employers, purchasers and providers, we value your assistance in engaging TTAG in a cooperative discussion.

Please don't hesitate to contact me if you would like additional information.

Best Regards,

Valerie Davidson, Chair TTAG

cc: Donald Berwick, M.D., CMS Director
Yvette Roubideaux, M.D., IHS Director
Kitty Marx, Director, TAG OEABS/CMS

The Definition of "Indian" Under the Affordable Care Act
Approved by the Tribal Technical Advisory Group
October 13, 2010

Generally. The Patient Protection and Affordable Care Act ("ACA") contains numerous favorable procedural rules, cost-sharing protections, and mandatory enrollment exemptions that apply specifically to American Indians and Alaska Natives ("AI/ANs"), referred to generally as "Indians" in the ACA. However, these Indian specific provisions do not uniformly define the term "Indian," and in many cases do not include any definition at all. This creates enormous potential for confusion in th implementation of the ACA and makes it likely that many AI/ANs will not receive the benefits and special protections intended for them in the law.

Effective July 1, 2010, the Centers for Medicare and Medicaid Services ("CMS") adopted a definition of "Indian" in its implementation of the Medicaid cost sharing protections enacted in Sec. 5006 of the American Recovery and Reinvestment Act ("Recovery Act") (codified at 42 U.S.C. § 1396o(j)). This regulation, 42 C.F.R. § 447.50, which is applicable to Part 447, Subpart A, Payments; General Provisions, 42 C.F.R. § 447.1-447.520, broadly defines the term "Indian" consistent with the Indian Health Service's ("IHS") regulations on eligibility for IHS services.

This definition, found at 42 C.F.R. § 447.50, should be adopted uniformly in implementing the ACA, including for the Exchange Plans, Medicaid expansion, and the specific AI/AN provisions. Doing so will avoid administrative confusion and mistakes and facilitate ease of enrollment. Even more importantly, doing so will advance fulfillment of the federal government's special trust responsibility toward AI/ANs, promote the ACA's objectives of making health coverage more accessible to the uninsured, and address the alarmingly inadequate access to health services by AI/ANs due to underfunding of the IHS.

Analysis. Where the term "Indian" or "member of an Indian tribe" is defined in the ACA, one of three definitions is used: Indian Self-Determination and Education Assistance Act, as amended, ("ISDEAA") Section 4(d); Internal Revenue Code of 1986, as amended, ("IRC") Section 45A(c)(6); and Indian Health Care Improvement Act, as amended, ("IHCIA") Sec. 4, 4(c), or 4(d).[1]

Although three different definitions are relied upon, their wording is substantially similar. IHCIA Sec. 4(13) (formerly Sec. 4(c)) and ISDEAA Sec. 4(d) each define the term "Indian" as a "person who is a member of an Indian tribe."[2] The IRC refers only to members of an Indian

1/ Subsections (c) and (d) of the IHCIA were redesignated as paragraphs (13) and (14) by Section 104(3) of S. 1790 as reported by the Senate Committee on Indian Affairs ("SCIA"), which was incorporated by reference into the ACA pursuant to Sec. 10221. *See*, attached list of ACA sections citing to definitions.

2/ The IHCIA also defines two additional terms related to who is Indian. Section 4(3) defines California Indian to mean any Indian who is eligible for health services provided by the Service pursuant to section 809 who are:

> (1) Any member of a federally-recognized Indian tribe.
> (2) Any descendant of an Indian who was residing in California on June 1, 1852 if such descendant--

tribe and defines "Indian tribe". The definition of Indian tribe is almost identical among the three laws:

<table>
<tr><th>IHCIA Sec. 4(14)</th><th>ISDEAA Sec. 4(d)</th><th>IRC Sec. 45A(c)(6)</th></tr>
<tr><td colspan="2"></td><td>The term</td></tr>
<tr><td colspan="3">"Indian tribe" means any Indian tribe, band, nation</td></tr>
<tr><td colspan="2"></td><td>pueblo,</td></tr>
<tr><td colspan="3">or other organized group or community, including any Alaska Native village</td></tr>
<tr><td>or group</td><td colspan="2"></td></tr>
<tr><td colspan="3">or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.</td></tr>
</table>

The commonality among these definitions is critical for determining how they should be interpreted. The inclusion of the word "pueblo" in the IRC definition and the inclusion of the phrase "or group" in the IHCIA definition do not create any material differences in the meaning of the three definitions. As indicated in the above table, the remainder of the language in each definition is identical across the three laws.

(A) is a member of the Indian community served by a local program of the Service, and

(B) is regarded as an Indian by the Indian community in which such descendant lives.

(3) Any Indian who holds trust interests in public domain, national forest, or reservation allotments in California.

(4) Any Indian of California who is listed on the plans for distribution of the assets of rancherias and reservations located within the State of California under the Act of August 18, 1958 (72 Stat. 619), and any descendant of such an Indian.

Section 4(28) defines "urban Indian" to mean any individual who resides in an urban center ("any community which has a sufficient urban population with unmet health needs to warrant assistance under title V [of the IHCIA], as determined by the Secretary") and who meets one or more of the criteria in Sec 4(13)(1) through (4). These are: "any individual who

(1) irrespective of whether he or she lives on or near a reservation, is a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized now or in the future by the State in which they reside, or who is a descendant, in the first or second degree, of any such member, or

(2) is an Eskimo or Aleut or other Alaska Native, or

(3) is considered by the Secretary of the Interior to be an Indian for any purpose, or

(4) is determined to be an Indian under regulations promulgated by the Secretary.

The definition of "Indian" throughout Titles XIX–Medicaid and XXI–Children's Health Insurance Program (CHIP) of the Social Security Act has the meaning given the term in Section 4 of the IHCIA.[3] In regulations effective July 1, 2010, HHS/CMS interpreted Section 5006 of the Recovery Act, which amended Sec. 1916 of the SSA (codified at 42 U.S.C. § 1396o). In doing so it defined "Indian" to mean

> any individual defined at 25 USC 1603(c)[IHCIA Sec. 4(13)], 1603(f) [IHCIA Sec. 4(28) , or 1679(b) [IHCIA Sec. 809(a)], or who has been determined eligible as an Indian, pursuant to Sec. 136.12 of this part. This means the individual:
>
> (i) Is a member of a Federally-recognized Indian tribe;
>
> (ii) Resides in an urban center and meets one or more of the following four criteria:
>
> (A) Is a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized now or in the future by the State in which they reside, or who is a descendant, in the first or second degree, of any such member;
>
> (B) Is an Eskimo or Aleut or other Alaska Native;
>
> (C) Is considered by the Secretary of the Interior to be an Indian for any purpose; or
>
> (D) Is determined to be an Indian under regulations promulgated by the Secretary;
>
> (iii) Is considered by the Secretary of the Interior to be an Indian for any purpose; or
>
> (iv) Is considered by the Secretary of Health and Human Services to be an Indian for purposes of eligibility for Indian health care services, including as a California Indian, Eskimo, Aleut, or other Alaska Native."[4]

HHS's construction of the term "Indian" is entitled to deference both as a matter of law and practicality and should be applied throughout the ACA. As a matter of law, the United States Supreme Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."[5] HHS is the umbrella agency responsible for the administration of Indian health programs and the fulfillment of the special trust responsibility owed to Indians, as well as administration of Medicaid and CHIP and the Exchange Plans newly enacted under the ACA. Its interpretation of the term "Indian" is due deference and should be controlling.

As a matter of practicality, reliance on different definitions to implement the various provisions of the ACA would result in administrative chaos and thwart the intention of Congress that the ACA result in streamlined access to health care coverage. This is clearest when one considers the requirement that applications for Exchange Plans and for Medicaid be integrated into a single online accessible application by 2014.

3/ SSA Sec. 1139(c) (codified at 42 U.S.C. § 1320b-9(c)), as amended by ACA Sec. 2901(d).
4/ 42 C.F.R. § 447.50.
5/ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

If a narrower definition than that adopted by HHS/CMS to implement the Medicaid cost sharing protection were used to apply the protections for Indians under the Exchange Plans or Tax Code inconsistent outcomes would result creating administrative confusion and uncertainty. All Indians as defined under the IHCIA Sec. 4 (i.e. the same definition underlying the regulation adopted by CMS to implement ARRA Sec. 5006) are entitled to special monthly enrollment. Items and services provided to an "Indian" enrolled in a qualified health plan "directly by the [IHS], an Indian Tribe, Tribal Organization, or Urban Indian Organization" are not subject to any cost sharing. ACA Sec. 1402(d)(2). "Indian" in Sec. 1402(d)(2) is defined as in (d)(1), which refers to the definition in the ISDEAA.[6] However, Congress must have intended urban Indians to benefit as well, or there would have been no need to refer to services provided by Urban Indian Organizations. And, since both subsections (d)(1) and (d)(2) rely on the same definition of "Indian," the protection under (d)(1) for Indians below 300 percent of poverty must be intended to apply to all of the Indians entitled to protection under (d)(2). That outcome requires reliance on the definition adopted by HHS/CMS pursuant to the definition in the IHCIA.

Similarly, according to Sec. 1411(b)(5)(A), individuals entitled to an exemption certificate under Sec. 1311(d)(4)(H) include Indians. The definition of the term "Indian" in Sec. 1311(c)(6)(D) (regarding special enrollment periods) is the definition in the IHCIA. But, the definition that is referred to in the provision regarding exemption from tax penalties under Sec. 1501(e)(3) is for those individuals who are members of tribes as defined in the IRC. To effectively administer both of these provisions, the definition of the term "Indian" must be implemented identically – as it has been in 42 C.F.R. § 447.50.

Further, to comply with a fundamental directive of the ACA (as stated in Sec. 1413(a)) States must integrate the application for Medicaid and the Exchange Plans into a single form. The objective, of course, is to simplify enrollment for eligible consumers. For the single application to work for Indians and adequately inform them of the special protections available to them, the term "Indian" must have the same meaning for both programs. It should be the definition of Indian found in the IHCIA and now construed by HHS/CMS at 42 C.F.R. § 447.50.

Conclusion. The various references to the meaning of "Indian," which are functionally identical, must be reconciled by using a single implementation definition. The correct definition to achieve this outcome is that adopted by HHS at 42 C.F.R. § 447.50 in which it has already construed the meaning of "Indian" under Section 4 of the IHCIA. The intent of the ACA and of individual provisions within it, the objectives of the this law, and the deference due to HHS under longstanding legal principles make this the most appropriate outcome.

6/ Any superficial differences between the interpretation of Indian under the IHCIA and the ISDEAA disappears when construed for programmatic purposes. Regulations interpreting Title V of the ISDEAA, the self-governance provisions that apply to assumption of IHS programs by tribes provide very broad authority for tribes to redesign programs. They impose only one limitation: that "the redesign or consolidation does not have the effect of denying eligibility for services to population groups otherwise eligible under applicable Federal law." 42 C.F.R. § 137.185.

ACA PROVISIONS DEFINING INDIAN OR MEMBER OF INDIAN TRIBE

Title I Quality, Affordable Health Care for All Americans; Subtitle D Available Coverage Choices for All Americans; Part I Establishment of Qualified Health Plans

ACA Sec. 1311(d)(4)(D) ("special monthly enrollment periods for Indians (as defined in section 4 of the [IHCIA].")

Title I, Subtitle E Affordable Coverage Choices for All Americans, Part I Premium Tax Credits and Cost-Sharing Reductions; Subpart A–Premium Tax Credits and Cost-Sharing Reductions

ACA Sec. 1402(d)(1) Indians under 300% of Poverty ("If an individual enrolled in any qualified health plan in the individual market through an Exchange is an Indian (as defined in section 4(d) of the [ISDEAA] . . .".)

ACA Sec. 1402(d)(2) Item or services furnished through Indian Health Providers ("If an Indian (as so defined) is furnished an item or service directly by the [IHS], an Indian Tribe, Tribal Organization, or Urban Indian Organization . . . no cost sharing" and no reduction in payment to provider).

Title I, Subtitle E Affordable Coverage Choices for All Americans, Part I Premium Tax Credits and Cost-Sharing Reductions; Subpart B–Eligibility Determinations

ACA Sec. 1411(b)(5)(A) Exemption from Individual Responsibility; obtaining an exemption certificate under Sec. 1311(d)(4)(H) (includes "as an Indian" with no definition.

ACA Sec. 1501(b) amended Internal Revenue Code of 1986 (IRC) by adding new section 5000a. Subsection (e)(3) provides for no tax penalty for "Any applicable individual for any during which the individual is a member of an Indian tribe (as defined in section 45A(c)(6).

Title II–Role of Public Programs, Subtitle K–Special Protections for AI/ANs.

ACA Sec. 2901(a) refers back to Sec. 1402(d).

ACA Sec. 2901(c) Facilitating Enrollment of Indians under Express Lane Option amends Sec. 1902 of the SSA (42 U.S.C. § 1396a(e)(13)(F(ii))

ACA Sec. 2901(d) Amends SSA Sec. 1139(c) (42 U.S.C. § 1320b-9(c)) to made it read: "For the purposes of this section, title XIX, and title XXI, the terms 'Indian', 'Indian Tribe', 'Indian Health Program', 'Tribal Organization', and 'Urban Indian Organization' have the meanings given those terms in section 4 of the [IHCIA]."

Title IV–Prevention of Chronic Disease and Improving Public Health; Subtitle B–Increasing Access to Clinical Preventive Services

ACA Sec. 4102(a) amended the Public Health Service Act by adding a new Part T– Oral Healthcare Prevention Activities. In the new Sec. 399LL the campaign is targeted to include "Indians, Alaska Natives and Native Hawaiians (as defined in section 4(c) of the [IHCIA]. . .." *Also see*, Sec. 399LL-2(b), which provides for grants "to Indians, Indian tribes, tribal organizations and urban Indian organizations (as such terms are defined in section 4 of the [IHCIA]."

Title VI-Transparency and Program Integrity; Subtitle D–Patient-Centered Outcomes Research

ACA Sec. 6301(e), which establishes a trust fund to support patient centered outcomes research, provides an exemption for fees on insurance plans under new IRC Sec. 4377(b)(3)(D). The exemption applies to "any program established by Federal law for providing medical care (other than through insurance policies) to members of Indian tribes (as defined in section 4(d) of the [IHCIA]."

Title IX–Revenue Provision; Subtitle B–Other Provisions

ACA Sec. 9021 Exclusion of Health Benefits Provided by Indian Tribal Governments. Adds a new IRC Sec. 139D Indian Health Care Benefits under which "qualified Indian health care benefits" are excluded from gross income. The exemption is extended to "a member of an Indian tribe or tribe, includ[ing] a spouse or dependent of such member". "Indian tribe" has the meaning in IRC Sec. 45A(c)(6).